

In the Supreme Court of the United States

ON WRIT OF HABEAS CORPUS

No. 123

THE UNITED STEEL WORKS OF AMERICA

Respondent

NATIONAL LABOR RELATIONS BOARD

Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION

PAUL E. HARRIS

General Counsel

Washington, D. C.

Attorney for Respondent

ROBERT B. WARR

General Counsel

National Labor Relations Board

Washington, D. C.

Attorney for Respondent



INDEX.

PETITION FOR A WRIT OF CERTIORARI	1
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	4
Specifications of Errors to be Urged	8
Reasons for Granting the Writ	9
BRIEF IN SUPPORT OF PETITION	13
Summary of Argument	13
I. Consolidation of Cases	13
II. Responsibility of Employer for Statement of Foreman	14
III. Order Not Supported by Evidence	14
Argument	15
I. Consolidation	15
1. History of cases consolidated and order of consolidation	15
2. Such a consolidation is not authorized by the Act	16
3. Even if the power to consolidate is impliedly granted, consolidation in the instant case is improper since conditions authorizing consoli- dation are not present	20
(a) There is no identity of parties	20
(b) There is no identity of subject matter ...	20
4. The consolidation of these actions was preju- dicial and denies petitioner due process of law	21

II. Responsibility of Employer for Statements of Foreman	23
III. Order Not Supported by Evidence	24
1. Company Domination of Independent	24
2. Individual Discriminations and Discharges ..	29
Paul Yarwood	31
John Bacos	33
Nick Nacco	34
Harry Evans	36
Alex Miller	37
Joe Villio	38
John Toth	40
Hemen Estes	41
Alfred Whitt	42
Thomas Liberatore	44
Wendell Matthews	45
Anthony Villio	46
Alex Sabo	48
Anthony Nardo	48
Mike Infante	50
3. Discrimination for Giving Testimony	51
4. Rights Guaranteed in Section 7	52
Conclusion	57

APPENDIX:

Statutes Involved—National Labor Relations Act.	58
Rules and Regulations of the National Labor Relations Board—Series 1 As Amended, Article II..	63

TABLE OF AUTHORITIES.

Cases.

<i>American Federation of Labor vs. N. L. R. B.</i> , 308 U. S. 401	20, 21
<i>Consolidated Edison Co. vs. N. L. R. B.</i> , 305 U. S. 197, 83 L. Ed. 126	10, 24, 57
<i>Continental Box Co. vs. N. L. R. B.</i> , 113 Fed. (2nd) 93	25
<i>Cupples vs. N. L. R. B.</i> , 106 Fed. (2nd) 100.....	10, 24
<i>E. I. DuPont De Nemours & Co. vs. N. L. R. B.</i> , 116 Fed. (2nd) 388	10
<i>Hovey v. Elliott</i> , 167 U. S. 409.....	21
<i>Jefferson Electric Co. vs. N. L. R. B.</i> , 102 Fed. (2nd) 949	25
<i>Kiddie Kover Mfg. Co. vs. N. L. R. B.</i> , 105 Fed. (2nd) 179	25
<i>Midland Steel Products Co. vs. N. L. R. B.</i> , 113 Fed. (2nd) 800	25
<i>N. L. R. B. vs. Empire Furniture Corporation</i> , 107 Fed. (2nd) 92	10, 24
<i>N. L. R. B. vs. Lightner Publishing Co.</i> , 113 Fed. (2nd) 621	25
<i>N. L. R. B. vs. Mackey Radio & Telegraph Co.</i> , 304 U. S. 333	21, 22
<i>N. L. R. B. vs. Sparks-Withington Company</i> , 119 Fed. (2nd) 78	10, 24
<i>N. L. R. B. vs. Swank Products Company</i> , 108 Fed. (2nd) 872	10, 24
<i>N. L. R. B. vs. Union Pacific Stages</i> , 99 Fed. (2nd) 153	25
<i>N. L. R. B. vs. Whittier Mills</i> , 111 Fed. (2nd) 474...	10, 24
<i>Nebel Knitting Co. vs. N. L. R. B.</i> , 103 Fed. (2nd) 594	25

<i>Pennoyer vs. Neff</i> , 95 U. S. 714.....	21
<i>Quaker State Oil and Refining Corporation vs. N. L. R. B.</i> , 119 Fed. (2nd) 631.....	10
<i>Virginia Ferry Corp. vs. N. L. R. B.</i> , 101 Fed. (2nd) 103	25

Texts.

1 <i>C. J.</i> 1122, Sec. 311.....	19
1 <i>C. J.</i> 1125, Sec. 320.....	20
1 <i>C. J.</i> 1126, Sec. 321.....	20

Statutes.

Judicial Code, Section 240 (a) (28 U. S. C. A. Section 347 (a))	2
National Labor Relations Act (29 U. S. C. A. Section 151 <i>et seq.</i>):	
Section 2	15
Section 7	2, 3, 14, 52, 53, 55, 58
Section 8	2, 7, 14, 15, 58
Section 9	2, 7, 8, 9, 13, 15, 16, 17, 18, 19, 20, 59
Section 10	2, 8, 13, 16, 17, 18, 19, 20, 24, 60

Rules.

Rules and Regulations of National Labor Relations Board, Article II, Section 37 (b).....	2, 15, 16, 63
Rules of U. S. Supreme Court, Rule 38, Section 5 (b) ..	2

Constitution.

Constitution of the United States, Fifth Amendment..	3, 8
--	------

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No.

THE NILES FIRE BRICK COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Niles Fire Brick Company, the petitioner, prays that a Writ of Certiorari be issued to review the judgment and order of the United States Circuit Court of Appeals for the Sixth Circuit, entered on December 5, 1941, affirming the order of the National Labor Relations Board made on the 28th day of December, 1939.

OPINIONS BELOW.

The findings of fact, conclusions of law, and order of the National Labor Relations Board, hereinafter called "The Board," are printed on pages 36 to 114 of the Record and reported in Volume 18, No. 98 in the Official Reports of the Board. The opinion of the Circuit Court of Appeals is reported in 124 Fed. (2nd) 366.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 5, 1941, and its order was entered on December 5th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) of the National Labor Relations Act (29 U. S. C. A. Section 160 (e)), and under General Rule 38 of this Court, Section 5, subdivision (b).

STATUTES INVOLVED.

The Statute involved is the National Labor Relations Act, which we shall here refer to as the "Wagner Act" or "The Act" (29 U. S. C. A. Section 151 *et seq.*). The pertinent provisions of the Act are: Section 7, Section 8 (1) (2) (3) (4) (5), Section 9 (a), (b), (c), (d), Section 10 (a), (b), (c), (e). Because of the length of these provisions we shall set them forth in an appendix.

QUESTIONS PRESENTED.

1. Where, in a dispute between employees concerning exclusive representation for purposes of collective bargaining, a proceeding was had under Section 9 (c) of the Act, can such proceeding after hearing and before decision be later consolidated with a proceeding subsequently brought against the employer under the provisions of Section 10 (b) of the Act wherein the employer is charged with unfair labor practices?

2. In the event proceedings are consolidated as stated above pursuant to Article II, Section 37 (b) of the Rules and Regulations of the Board (R. 38), can the evidence introduced in the proceeding under section 9 (c) be used by the Board to prove jurisdiction in its case against the employer in the proceeding under Section 10 (b)?

3. Where, in a proceeding under Section 10 (b) of the Act, a specific mode of procedure is provided in the Act, but the Board arbitrarily adopted a different mode of pro-

cedure over the objection of the employer, the effect of which is to permit the Board to establish jurisdiction by improper evidence and thereby shift the burden of proof so that the employer is required to disprove the jurisdiction of the Board, and where the Board then denies the employer the right to introduce evidence to disprove the jurisdiction of the Board, was the employer denied due process of law under the Fifth Amendment of the Constitution of the United States?

4. Can an employer be chargeable with an unfair labor practice in violation of the Act because a foreman has made statements to employees in opposition to one union and in favor of another union, where such statements are made without authority and in direct opposition to orders of his superior officers, and where such conduct on the part of the foreman never came to the attention of the employer's officials so as to afford an opportunity to rebuke him and disavow his authority?

5. Whether the Board's finding that petitioner dominated and interfered with the formation and administration, and contributed support to the independent union was supported by adequate evidence?

6. Whether the Board's finding that petitioner discriminated against employees listed in Appendices A, B and C, in regard to their hire and tenure and terms and conditions of employment, thereby discouraging membership in a labor organization, was supported by adequate evidence?

7. Whether the Board's finding that petitioner discriminated against Paul Yarwood because he had given testimony under the Act was supported by adequate evidence?

8. Whether the Board's finding that petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act was supported by adequate evidence?

STATEMENT.

The petitioner, The Niles Fire Brick Company, is located in Niles, Ohio in what is commonly known in industry as the Mahoning Valley District. It employs approximately 200 men (R. 159) in the manufacture of refractories commonly known as "fire brick" (R. 540). In this Mahoning Valley District are located steel plants which are its principal customers.

During the latter part of May and the first part of June, 1937, the Steel Workers' Organizing Committee (S. W. O. C.) solicited members among the employees of the petitioner's plant (R. 666, 667, 835) which organization is hereinafter referred to as the "C. I. O." and designated in the Record as the "Union" (R. 211 and 212). It was during this period that the so-called "Little Steel Strike" was in progress involving two of the principal customers of the petitioner, namely, The Youngstown Sheet & Tube Company and The Republic Steel Corporation (R. 225, 312, 313, 604, 843, 851), and strikes and labor unrest were prevalent throughout the entire valley (R. 550, 615, 666, 850). Due to these strikes and the consequent shutting down of the operations in these two plants, it became necessary to shut down the petitioner's plant indefinitely (R. 545, 604). On June 5th, 1937, the plant did close and did not reopen until June 28th, 1937 (R. 602).

Due to the fact that the management believed the plant would be closed down for an extended period and since many of the employees desired advances on their pay to enable them to return to their homes in Kentucky, it was decided to advance the payday one week in order to accommodate them (R. 345, 545 to 548, 602 to 605). When the men were paid their badges were taken up since it was uncertain how many would return when operations were resumed, and since a deposit had been made by each employee for his badge. Some employees believed that the advance in the payday and the return of the deposit on their checks indicated that they had been discharged. How-

ever, they were told by the management that this was not the case and to assure the employees of its good faith gave them a written statement to the effect that they had not been discharged but that all employees would be returned to their regular employment and given their share of the work when the plant reopened (R. 873, Bd. Ex. 2).

On July 9th, a committee purporting to represent the C. I. O. attempted to negotiate a contract with the petitioner* (R. 156, 306, 610). After several conferences no agreement was reached with the result that on July 19th the Union called a strike.

Prior to and during the strike, dissension and discord arose among members of the C. I. O. growing out of the conduct of the union affairs by the officers and the calling of the strike. The result was that most of the employees returned to work (R. 616) before the strike was officially terminated. This split in the union ranks caused the formation of a union group composed largely of union members who decided to withdraw from the union and form an independent organization (R. 169, 170, 200, 201, 311, 787 to 793, 808 to 813, 817, 818, 836, 839, 840, 854 to 856, 861). This new group of employees is hereinafter referred to as the "Independent." The strike was officially terminated on August 1 (R. 157, 616).

At the time the strike began, eight kilns loaded with bricks were being burned (R. 733). Ordinarily, it takes eleven to thirteen days to complete the burning of bricks in a kiln. The bricks in the kilns at the time of the strike call had been burning only two days (R. 436). When the men went on strike they left the kilns without anyone to attend them with the result that it was necessary to seal them. When the plant resumed operations, it was necessary to reopen and unload these kilns to determine whether the bricks had been spoiled (R. 244). Operations had to start from the bottom and it was impossible to give all of the men immediate employment after the strike ended.

The plant was operated only during the day, and night turns were not started until later (R. 616, 617).

Due to the inability of the petitioner to immediately place all employees at work, the Union sought the assistance of a Mr. Reichert, a representative of the Federal Department of Labor. The petitioner entered whole-heartedly with him in an attempt to solve mutual problems. It even gave employment to those whose services were not actually needed at that time by giving them work in other departments, and as a result most of the existing issues were settled.

On September 23, 1937, the C. I. O. filed with the Regional Director of the National Labor Relations Board a petition requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act. On October 4th, the Board ordered the Regional Director to conduct an investigation and provide for an appropriate hearing. Such a hearing was held in Warren, Ohio, on November 1 and 2, 1937 (R. 36 and 37). At such hearing two of the petitioner's employees, acting on behalf of themselves and about 160 other employees, were granted leave to intervene (R. 36, 937, 938). The Board and the intervenors introduced evidence and the intervenors presented a petition opposing the election (Intervenors' Exhibit No. 4) (R. 939 to 944). The petitioner did not introduce any evidence nor participate in the hearing other than to raise a formal objection to the jurisdiction of the Board.

Within a short time after this hearing, the C. I. O. requested the Board not to conduct an election since it believed it would lose. Pursuant to such request the Board neither conducted an election, nor rendered any decision in the case. Later, on November 15th, 1937, the C. I. O. filed a charge with the Board alleging that the petitioner had been engaging in unfair labor practices (R. 202, 879).

On February 28, 1938, the Board issued its complaint based on the C. I. O. charges of November 15, 1937, alleging

that the petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) (2) (3) (4) (5) and Sec. 2 (6) (7) of the Act (R. 23 to 28). To this complaint the petitioner filed its answer denying the allegations contained therein (R. 29) and pursuant to notice a hearing was held at Niles, Ohio, commencing March 10, 1938 (R. 142).

At the commencement of the hearing on March 10th, the Board offered in evidence an order consolidating the representation case instituted by the Board on October 4, 1937 under Section 9 (c) of the Act and the instant case which was initiated by the filing of the complaint against the petitioner on February 28, 1938. This order of consolidation was presumably made on January 14, 1938, before the complaint in the instant case was issued, and the cases were consolidated without the knowledge of or notice to the petitioner. The Board then offered in evidence a transcript of the proceedings and evidence in the representation case as a part of the evidence in this case. The petitioner immediately entered its objection to the consolidation of the cases and to the introduction of the transcript of evidence offered by the Board. However, these documents were both admitted over the objection of the petitioner (R. 39, 142 *et seq.* 146, 147). The Board offered no further evidence of its jurisdiction over the affairs of the petitioner and the Trial Examiner refused to permit the petitioner to introduce any evidence on this point (R. 541 to 543).

On September 12, 1938, the Trial Examiner filed his intermediate report and on December 28, 1939 the Board issued its decision and order in which it dismissed the petition for certification issued under Section 9 (c) of the Act, and found that the petitioner had engaged in unfair labor practices as therein set forth (R. 36 to 114). On January 6, 1941 the Board filed its petition for enforcement in the United States Circuit Court of Appeals for the Sixth Cir-

cuit (R. 1) and on December 5, 1941, that Court filed its opinion and order affirming the findings and order of the Board (R. 947, 948).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

I. In not holding that petitioner was denied due process of law under the Fifth Amendment of the Constitution of the United States where, in a proceeding against petitioner under Sec. 10 of the Act, the Labor Board erroneously consolidated with it a proceeding under Sec. 9 (c) of the Act which had been previously heard but not decided, and introduced into evidence over petitioner's objections the record of the proceedings under Sec. 9 (c); and where the Board thereafter in said hearing failed to introduce any evidence on the question of jurisdiction and denied petitioner the right to introduce any evidence on the same question (R. 142 *et seq.* 146, 147).

II. In holding that an employer is guilty of an unfair labor practice in violation of the Act by reason of statements made by a foreman in opposition to one union and in favor of another union where such statements are made without authority in direct opposition to orders of superior officers and where such conduct on the part of the foreman was unknown to the employer's officials so as to afford them an opportunity to rebuke him and disavow his authority.

III. In holding that the Board's finding was supported by adequate evidence with respect to (1) the domination, interference and support of the Independent Union; (2) petitioner's discrimination against employees listed in Appendices A, B and C in regard to their hire and tenure, and terms and conditions of employment, thereby discouraging membership in a labor organization; (3) petitioner's discrimination against Paul Yarwood because he had given testimony under the Act; (4) and petitioner's

interference with and restraint and coercion of its employees in the exercise of rights guaranteed in Section 7 of the Act.

REASONS FOR GRANTING THE WRIT.

1. The Court below, in holding that a proceeding under Section 9 (c) of the Act after hearing and before decision can be consolidated with a proceeding subsequently brought against the employer under the provisions of Section 10 (b) of the Act wherein the employer is charged with unfair labor practices, has decided an important question of Federal law which has not been but should be settled by this Court.

2. The Court below, in holding that the evidence introduced in a proceeding under Section 9 (c) of the Act may be used by the Board to prove its jurisdiction in a proceeding subsequently brought against the employer under Section 10 (b) of the Act when such cases are not heard jointly, has decided an important question of federal law which has not been but should be settled by this Court.

3. The petitioner was denied due process of law under the Fifth Amendment of the Constitution of the United States by the action of the Board set forth in 1 and 2 above, since the effect of such procedure was to shift the burden of proof to the employer so as to require the employer to disprove the jurisdiction of the Board. This, combined with the fact that the Board then denied the employer the right to introduce evidence to disprove the jurisdiction of the Board, denied petitioner due process.

4. The decision of the Court below gives sanction to an arbitrary form of procedure adopted by the Board contrary to the procedure prescribed by the Act, thereby denying petitioner due process of law.

5. The decision below in upholding the findings of the Board that an employer was responsible for a foreman's ex-

pression of opposition to a union and his efforts to promote an independent union where such statements were made in direct opposition to orders of his superior officers and where such conduct never came to the attention of the employer is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *N. L. R. B. vs. Swank Products Company*, 108 Fed. (2nd) 872, and *Quaker State Oil and Refining Corporation vs. N. L. R. B.*, 119 Fed. (2nd) 631; the decision of the Fourth Circuit in *E. I. DuPont De Nemours & Co. vs. N. L. R. B.*, 116 Fed. (2nd) 388; the decision of the Fifth Circuit in *N. L. R. B. vs. Whittier Mills*, 111 Fed. (2nd) 474; the decisions of the Sixth Circuit in *N. L. R. B. vs. Sparks-Withington Company*, 119 Fed. (2nd) 78, and *N. L. R. B. vs. Empire Furniture Corporation*, 107 Fed. (2nd) 92; the decision of the Eighth Circuit in *Cupples vs. N. L. R. B.*, 106 Fed. (2nd) 100.

6. While the Court below did not expressly state the rule upon which it relied in determining that the findings of the Labor Board on issues of fact adverse to the petitioner were supported by adequate evidence, it is apparent that the Court ignored the rule enunciated by this Court in *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197, 83 L. Ed. 126, since the evidence supporting such findings of fact in most instances creates merely a suspicion and in no instance amounts to more than a mere scintilla.

7. The questions presented are of great public interest.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Sixth Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judg-

ment and order of the Circuit Court of Appeals may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated March 2, 1942.

THE NILES FIRE BRICK COMPANY,
Petitioner,

By PAUL Z. HODGE,
GEORGE W. SECREST,
Counsel for Petitioner.